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ART. I.—*An Essay on the Doctrine of Contracts; being an Inquiry how Contracts are affected in Law and Morals, by Concealment, Error, or Inadequate Price.* By GULIAN C. VERPLANCK. New York, 1825. 8vo. pp. 234.

WE believe it is Lord Bacon, who says, that important improvements in the existing laws of any country are not to be looked for either from mere technical lawyers, or from speculative philosophers. The first class he holds to be unfit for the task of legal reformation, because their intellectual habits are too narrow and confined, and the latter, because their theoretical notions are not enlightened by experience, and they are apt to generalize from a too hasty induction. The noble work of legislative improvement, *opus heroicum*, he assigns to those whom he calls *statesmen*, whose views are large and comprehensive, and at the same time rectified by an extensive and practical knowledge of human affairs. But in using this designation he certainly could not mean to apply it to those, who are vulgarly called statesmen; but who in all times have been, nearly without exception, entirely neglectful of every thing, except the business of war, negotiation, and finance.

Indeed the profound ignorance of the science of political economy, and of the philosophy of legislation, which attaches to some great names in this class, is truly remarkable. From the days of Pericles down to those of Pitt, what statesman has

devoted his attention to promoting the happiness of his fellow men, by an enlightened and anxious investigation of the laws by which they are governed, and by an honest effort to amend their glaring defects? Such men as Montesquieu, and Smith, and Filangieri, and Beccaria, and, notwithstanding his eccentricities, we will add, Bentham, have bestowed upon those subjects a depth of thought, and an extent of investigation, worthy of their importance; yet it is but recently that the writings of these and other philosophers have produced any effect upon the councils and conduct of the rulers of states. How else has it happened, that the administration of justice in most civilized countries continued in such a barbarous state, until the establishment of the new French codes, and that it still remains in the greater part of Europe so far short of fulfilling the great end of society? How has it happened, that it is still almost everywhere notoriously partial and corrupt, and where it is not so, that it should be burthened with so many idle, perplexing, and expensive forms of procedure? How is it, that the horrid practice of torture in criminal cases was in use all over Europe, until a comparatively recent period; in Scotland, so late as the year 1690; in Prussia, until the establishment of the Frederician code; in France, until the edict of Louis the Sixteenth, prompted by the benevolent mind of Malesherbes, and which was thought to be a mighty triumph of philosophy over inveterate prejudice? How has it happened, that in England, the country which is so far in advance of all other European nations in civil freedom, counsel were not allowed to the accused, even in cases of treason, where the terrors of the law and the whole weight of government are brought to bear upon the unhappy prisoner, until the statute of 7 Will. III, and is not allowed to this day in any capital case, except for the mere purpose of addressing the court upon such points of law as may arise! *

* "I look upon the administration of justice," says Lord Hardwicke, "as the principal and essential part of all government. The people know and judge of it by nothing else. The effects of this are felt every day by the meanest, in the business and affairs of common life. Statesmen indeed have their attention called off to more extensive political views; they look abroad into foreign countries, and consider your remote interests and connexions with other nations. But of what utility are those views, great as they are, unless they be referred back to your domestic peace and good order? The chief office of government is to secure us the regular course of law and justice." *Hansard's Parliamentary History*, vol. xiv. p. 20.

We have mentioned these things, not from a querulous disposition, nor because they are the most glaring examples we could have selected of the slow progress of legal improvement, and of the general indifference with which these subjects have been regarded by professional statesmen. We have only alluded to them for the purpose of contrasting this indifference with the spirit of inquiry, which has now gone forth. An anxious desire to engage in the investigation of these subjects is now extensively diffused. It is directed by such enlightened, sound, and practical views, that we may be allowed to hope for great improvements in all the institutions connected with the administration of justice. The liberal principles which have recently been professed by the British ministers, on questions relating to the science of legislation, and to political economy, are among the most remarkable signs of the diffusion of this spirit. At the time when Dr Smith wrote, firmly convinced as he was of the value and importance of the truths taught in his immortal work, he hardly dared to hope that they would ever be taken as a guide for the conduct of governments; and Sir Samuel Romilly, who had been so often baffled in his well considered projects of reform, by a blind and bigotted attachment to the existing order of things, could not have anticipated, that these projects were so soon to be adopted by the ministers of the crown, and carried through Parliament by the same influence, which had been before successfully exerted to defeat them.

The rulers of mankind begin to see, and to feel, that the civil and penal legislation, by which nations have been hitherto governed, is far behind the general improvement of the age; that time, 'the greatest innovator,' has been silently, but actively at work, whilst they have been attempting to resist those salutary changes, which are necessary to adapt existing institutions to the changes wrought by this mighty agent; and that to avert sudden and violent revolution they must *conduct off* the spirit of innovation, which has been let loose, in some safe course of gradual and considerate reformation. Hence the extensive alterations in the British laws of trade and navigation, which have been proposed by Mr Huskisson, and the revision and consolidation of the statutes suggested by Mr Peel. Hence, too, the appointment of a commission to inquire into the abuses connected with the administration of justice, in the Court of Chancery. In this country we have already done more towards the simplification of the laws, and the practice of the courts, than will

probably soon be accomplished in Great Britain, where abuses are more inveterate, and more closely connected with the whole existing order of things in the state. Here we have, perhaps, less difficulty to encounter from the horror of innovation, than from crude, rash, and improvident projects of reform. But with the characteristic good sense and moderation of our people, we shall probably find more than a compensation for the evils to be apprehended from this source, in that timid caution, which is inspired by the habitual prejudices of professional men, and which will not suffer any proposed amendment of the law to escape a severe scrutiny. More is perhaps to be apprehended from the impatience, with which a promised good is looked forward to, and which makes men unwilling to reflect how many deep and complicated considerations are connected with every change in the laws of a country.

Those, who refer to the three years' labours of Tribonian, and his associates, in the compilation of the Pandects, as an example of the facility, with which the whole body of the laws of a great empire may be consolidated into a code, are little aware of the immense difference of the materials, with which those legislators worked, from those, which must enter into the composition of a written code, in a country governed by the common law and equity system of England. They are also probably as little aware of the extreme crudity and imperfection of the work, which they produced in so short a space of time. The Ante-Justinian jurisprudence was rich in legal principles, drawn from natural law, and from the science of ethics and analagous reasoning, and skilfully adapted to the wants and necessities of civilized society. It had already been reduced to symmetry and method by the writings of the jurisconsults, who, according to Leibnitz, 'all resemble each other like twin brothers, insomuch that, from the style alone of any particular opinion, hardly any conjecture could be formed respecting the author.' The codifiers of that day had therefore little more to do, than to consolidate these *responsa prudentûm* with the imperial rescripts upon the same titles, and to arrange the whole in the natural order of the subjects. How inadequately they have accomplished this task, is best known to those who have studied the history of this science, at present almost entirely neglected, except by the scholars and civilians of Germany.

It is commonly supposed, that the compilers of the Pandects

intended to follow the general arrangement of the *Perpetual Edict;* yet this method is by no means uniformly adhered to, and the *Laws*, or as we should call them, *adjudged cases*, are cited and arranged in the most arbitrary and capricious manner. They are full of *antinomies*, or contradictory decisions, of different emperors, and of the jurisconsults of rival sects, which all the skill and subtilty of modern civilians have not been able to reconcile. The text of the writers, who are cited as the authorities for the *Laws*, is sometimes corrupted by the negligence and carelessness of the transcribers employed by Tribonian; and at others, the genuine text is falsified to subserve the vile purposes of a sovereign, 'who sold his judgment and his laws.' This work was undertaken by a superstitious and despotic prince, under the guidance of corrupt and profligate ministers, in the old age and decrepitude of the empire, when the shades of barbarism had covered the West, and were fast settling over the East. No wonder that the severe scrutiny of a more enlightened age has discovered so many blemishes in a code, compiled with such marvellous rapidity. The defects in the method of the original Pandects will be obvious to any one, who has the curiosity to examine the admirable edition of Pothier, (*Pandectæ Justinianeæ in Novum Ordinem Redactæ*,) upon which he spent the leisure of twenty years of his laborious life, in arranging the *Laws* in a natural method, in purifying the text, in filling up the numerous *lacunæ* left in the original work, and in connecting the whole together by a series of definitions, propositions, and corollaries, forming a complete system of the civil law, and for the first time actually accomplishing a work, of which the agents of Justinian had vainly boasted so many centuries before.

The public attention has been recently directed in this country to the subject of improvement in legislation. The measures adopted by the legislature of Louisiana for the compilation of a written code, and the steps taken by the state of New York, towards a more perfect revision of the statute laws, than has yet been attempted in this country, are very important indications of the progress of the public mind in respect to this subject. Every proposition for the amendment of the law, short of a complete written code, must contemplate either a revision of the text of the statutes, with a view to the correction and simplification of their phraseology, and a consolidation of the existing provisions in a better method and order, or to the ar-

rangement of the subjects; or it may combine with these improvements substantial alterations, incorporating more or less of the principles, which have been settled by the decisions of the courts of law and equity.

We shall say nothing at present of the wisdom of such a design, as that last mentioned. But supposing it to be expedient, an essential preliminary to its execution would seem to be a careful examination of the present system of law and equity, in order to ascertain upon what foundations it rests, how far its different parts are reconcileable with the principles of natural justice and the dictates of reason and conscience, how far they depend upon positive institution and the mere authority of adjudged cases, and whether they can be arranged into a consistent whole, suited to the wants and adapted to promote the welfare of a highly civilized and commercial society.

Such appears to be the object of the Essay before us, so far as respects a particular title of the law of Contracts. This it discusses, somewhat in the manner of Sir William Jones's elegant treatise on the law of Bailments, but with a bolder hand; and less with the purpose of reconciling the anomalies of the existing law, and of showing what *it is*, than of comparing its precepts with those of reason and conscience, and thus endeavoring to ascertain what *it ought to be*. In this point of view it aims at a higher object, than can be supposed to be intended by any treatise of mere technical law. Such a discussion ought properly to precede every proposition of reform, in general legislation. A code of laws cannot be prepared *pro re natâ*, and enacted without regard to the preexisting law, practice, and legal habits of the country where it is to be established.

Independently of their utility in this respect, investigations of this sort must always be attractive to those who regard law as a science founded on reason, and not merely resting on positive institution and the authority of precedents. They must also command the attention of those, who delight to trace the analogies of this science, and, in the words of Lord Bacon, to 'collect the rules and grounds dispersed throughout the body of the same laws, in order to see more profoundly into the reason of such judgments and ruled cases, and thereby to make more use of them for the decision of other cases more doubtful; so that the uncertainty of law, which is the principal and most just challenge that is made to the laws of our nation at this time, will, by this new strength, laid to the foundation, be somewhat the more settled and corrected.'

The question, which Mr Verplanck has investigated, arose out of a case determined in the Supreme Court of the United States, and reported in the second volume of Mr Wheaton's Reports, p. 195. The case related to the validity of a contract of sale made under the following circumstances. Some American merchants, who were on board the British fleet, after the memorable attack on New Orleans, in January, 1815, received the unexpected news of the treaty of peace, which had been signed at Ghent, and brought it up to the city the same night. Soon after sunrise the next morning, and before it could possibly be known among men of business, a merchant, who had been put in possession of the information, called upon another, and contracted for the purchase of a large quantity of tobacco at the market price of the day, without giving the vendor any hint of the intelligence, but at the same time without saying anything calculated to impose upon him. Immediately after the news of peace was publicly known, the price of tobacco rose more than fifty per cent.

Upon this state of facts, Mr Chief Justice Marshall, in delivering the opinion of the Court, observed, that the question was, 'whether the intelligence of extraneous circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor? *The Court is of opinion that he was not bound to communicate it.* It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties. But at the same time each party must take care not to say or do anything tending to impose upon the other.'

Mr Verplanck expresses his regret, that this important decision should be stated in this brief and general manner, and that the Chief Justice had not applied his logical and original mind to the thorough examination of this subject, in all its bearings. He then proceeds to enumerate some of the difficulties and contradictions which appear to embarrass the question of the nature and degree of equality required in contracts of mutual interest, as well in reference to inadequacy of price, as to the more perplexing difficulty of inequality of knowledge.

'All jurists,' says he, 'agree in general terms to recognise as the leading principle of the law of contracts, that good faith must be preserved, and that fraud or art on either side affords sufficient ground for the interference of the law, to protect or

relieve the injured party. Follow them out in applying this principle, and the uniformity ceases.

'In some cases, like that of the tobacco purchase just stated, legislators and judges, from the apparent necessity of the case, or as Chief Justice Marshall words it, "from the difficulty of circumscribing the opposite doctrine within proper limits," have considered the question, not so much on the ground of justice, as of policy and convenience, and refused to lend the aid of the law to relieve against unequal contracts, leaving the protection of each man's rights, under such circumstances, to his own prudence and foresight. With regard to the moral regulation of our conduct, they expressly distinguish between the coarse and imperfect morality, which they are willing to enforce at their own tribunal, and the sterner decrees of the Interior Forum,—for so the Roman law, by a noble metaphor, has termed the decisions of an enlightened conscience.

'Upon the same grounds of necessity and commercial policy, the courts of England and of the United States have rejected the civil law doctrine of implied warranties, have held that a full price does not imply any warranty of the character of the article, and even that goods of the lowest value may be described and sold as being of the highest, without the unfortunate purchaser's having any recourse to the seller, unless he could prove some positive fraud in the transaction. In short, they have often in various shapes recognised and applied the harsh maxim of *caveat emptor*, and thrown upon the buyer the burthen of every loss, against which it was possible for him to have protected himself by caution and suspicion.

'But on the other hand, in these same courts, a complete head of commercial law has been gradually filled up almost in our own days, by a continued series of wise judicial legislation, upon principles scarcely reconcileable with these. The law of insurance requires everywhere the most perfect sincerity and frankness between the contracting parties, and the slightest suppression of a material fact is held to exonerate the opposite party.

'In the same spirit too, the courts of equity, for the last century, have enforced a very hightoned and almost scrupulous morality in a large class of cases of another sort; invalidating or refusing to enforce agreements, and setting aside or rectifying conveyances made for an inadequate consideration, or through mistake as to facts, or from ignorance of legal rights.

'Our systems of equity and of insurance law are doubtless indebted, in a great degree, to the influence of the civil code, for this infusion of a different spirit from that which reigned in the ancient common law of England.

'The Roman law, as taught by the continental jurists, insisted upon a rigid equality between the contracting parties, and a full and perfect equivalent given and received, in every sale; while it prohibited all reservation concerning any point which the party with whom we contract has an interest in knowing, touching the thing which is the subject of the bargain. This it carries in theory to an extent which few men of business in our days, not excepting the most scrupulously honest, would allow to be wise and just. In many cases, indeed, it must have been literally impossible to apply the theory to practice. It was a natural consequence of this, that both in the Roman law itself, and in those systems of jurisprudence professedly modelled upon it, these principles, after having been broadly laid down as the undoubted and universal moral rule, are restricted for legal purposes by regulations and limitations wholly arbitrary, and somewhat contradictory to the professed spirit of the law.'

After this general statement of the doubts and discrepancies which involve this branch of the law in contradictions and uncertainty, the author proceeds, in a second chapter, to trace more particularly the doctrines of the courts of common law and equity in England and the United States, on concealment, inadequacy of price, warranty, secret defects, fraud, scienter, the law of insurance, &c; and to expose the palpable incongruities between the different parts of the same system, and the difficulty of reconciling them.

The common law of England, like the language of that country, is derived from various sources widely remote from each other. The old Saxon customs were merged in the refined subtilties of the feudal system, brought in by the Norman conquest; the harshness of which was gradually mitigated by that system of equity introduced by the churchmen, the leading principles of which were borrowed from the civil and canon laws. To these was superadded, at a still later period, a body of commercial and maritime law, derived from the continental codes, and improved and perfected by the great judges, who presided in the English tribunals during the last century. Consistency and uniformity of style could hardly be looked for in an edifice, thus gradually erected, at long intervals of time, with various and discordant materials. It might be compared to a vast Gothic building, the massy foundations of which were laid under the Heptarchy, the superstructure bearing marks of the curious skill and intricacies of Norman architecture, with a

modern addition of the light, elegant, and commodious Grecian portico.

But not to pursue this metaphor, let us proceed with Mr Verplanck to examine that portion of this complicated system, which relates to the present subject. The laws of every nation are more or less impressed with the peculiar traits of its manners and character, whether these are produced by moral or physical causes. A savage race, like the Saxons, and a nation of military barbarians, like the Normans, without any science except the logic of the schools, could hardly be expected to derive their law of contracts from a very pure and enlightened source, or to found it upon the enlarged principles of civilized morality. A litigious spirit was one of the most remarkable characteristics of the Normans, and entangled their legal proceedings with intricate forms and captious subtilties.*

The maxim of *stare decisis*, which has been adhered to more strictly in England than in any other country, has given a character of inflexibility to this artificial system of jurisprudence. Accordingly we find, that the stern and harsh rule of *caveat emptor* is perpetually invoked by the common law writers and judges, from the Year Books and the old Abridgments, down to the times of Mansfield and Ellenborough, when more liberal views of commercial law had prevailed in all those insulated provinces of the law, which were unoccupied by ancient decisions. This general current of doctrine and adjudication upon the law of bargain and sale, was deflected from its uniform course about the middle of the last century, when it was held by some of the authorities, that a *fair price*, that is, the usual market price of the commodity, implied a warranty of its soundness. But this anomaly was corrected, and the strict rule of the common law was again restored in all its original rigor, under the enlightened administration of the judges we have just mentioned. The same rule has been almost universally adopted in the courts of this country; so that, although *a warranty of title* is implied in every sale of a personal chattel, yet there must be either an express warranty, or actual fraud, to set aside

* A French writer, quoted by Barrington, (on the Statutes,) speaking of the common law of England, says; 'Leges Angliæ plenæ sunt tricarum ambiguitatumque, et sibi contrariæ. Fuerunt siquidem excogitatæ atque sancitæ a Normannis, quibus nulla gens magis litigiosa, atque in controversiis machinandis et proferendis fallacior, reperiri potest.' *Philip. Honor. Barringt. on the Stat.* p. 51.

the contract *for a defect in the thing sold.* The same system, also, refuses to recognise inadequacy of price, as a ground for rescinding the contract.

But in the courts of equity, sitting under the same roof of Westminster Hall, and frequently consisting of the same judges, a different, and, in some respects, opposite doctrine prevails. In the gradual progress of society, when commerce and civilization began to dawn, the defects of the ancient common law became manifest. These defects were particularly disclosed, in its omitting to furnish an adequate remedy for the injury sustained by the breach of contract, where the nature and spirit of the agreement, and the obvious intention of the parties, required a specific performance. For except in real actions, and in ejectment, where the formal proceedings are always *in rem,* and in the actions of detinue and replevin, where the thing sued for is specifically recovered, a court of common law uniformly gives a pecuniary compensation for civil injuries.

It frequently happened, that this remedy was insufficient to repair the injury sustained by the contracting parties, and to place them in the same situation they were in before the breach of the agreement. Hence the origin of that important branch of equity jurisdiction, which, although it was long contested by the common law courts, was at last firmly established, and matured into a regular system. But as it rested in the discretion of the chancellor to give or refuse relief, where the party applied for a specific execution of the contract, various conflicting decisions have taken place upon the question, whether it should be refused upon the mere ground of inadequacy of price? But it is well settled, that if the contract has already been carried into execution by the parties, relief will not be given by rescinding it. At law, the contract is equally valid in both cases; but what shall be the measure of damages to be given to the party, who brings his action to enforce it, is a question still involved in doubt and obscurity.

It is a received opinion among practitioners, that the vendor is bound by the common law to communicate those latent defects, which are not accessible to the vendee, and which he could not by any possible attention have discovered. But the author of the present treatise thinks, that this opinion is erroneous; that it cannot be reconciled with the analogies of the same branch of law, and in particular is inconsistent with the doctrine of *caveat emptor;* and that, if it were now subjected

to the solemn determination of the courts, it would be rejected without hesitation.

If he is right in this impression, the law, as to the suppression both of intrinsic and extrinsic circumstances, will coincide and harmonize; as upon principle it certainly ought. But, at the same time, it will rest upon a foundation very difficult to be reconciled, not merely with the dictates of an austere morality, but with common honesty.

This narrow rule, which is applied to protect the vendor from responsibility for defects in his unwarranted goods, is powerfully contrasted with the law, which compels the artist, or workman, who engages to perform any particular work, to apply the diligence, attention, and skill necessary to perform it in a workmanlike manner. Thus, for example, a different measure of justice is applied to the conduct of the person, who builds and sells a ship on his own account, and to him, who contracts with a merchant to build a ship. In the one case, he is not answerable for the defects against which he does not expressly warrant, unless there be actual fraud; in the other, he is liable for the consequences of his unskilfulness, or want of care. Here again we recognise the opposite sources, from which these contradictory rules have been derived. In the harsh features of the one we trace its comparatively barbarous origin in the feudal ages; whilst in the other we distinctly perceive the marks of civilization and refinement. The one is consistent with that pure standard of morals, which should be applied in enforcing all the duties of perfect obligation, whilst the other requires nothing more, than the observance of that good faith, which is the most powerful ligament of human society.

After explaining these principles and decisions, in a very clear and perspicuous manner, Mr Verplanck goes on to inquire how far their analogy has been preserved, in other titles of the law. With this view, he examines the history of the law of insurance, traces its origin to the learned labors of the civilians of the European continent, and pays a just tribute to the genius of Lord Mansfield, who first made his countrymen acquainted with this branch of law, and laid the foundations of that noble edifice of commercial jurisprudence, which is the just pride of England. He shows, however, that it has a very slight analogy with the more anciently settled parts of the English law of contracts. In the contract of insurance, the law demands from each party, not only strict integrity, but the most unreserved frank-

ness and candor. Every fact within the knowledge of the insured, ignorance or mistake respecting which might induce the underwriters to make an erroneous estimate of the risk or premium, is considered as a material fact, the misrepresentation or suppression of which will avoid the policy. Not only those parts of the agreement, which enter into the written contract, but those collateral representations, either written or verbal, which relate to it, fall within this comprehensive requisition.

'Here,' says Mr Verplanck, 'let us pause a moment, and observe the difference of that spirit which prevails in the law of insurance, from that which regulates the common law regarding other bargains. It is impossible to assign any substantial reason for this remarkable contrast, either upon the grounds of natural equity, or upon those of policy. The practice of insurance is, indeed, of admirable utility. Antiquity classed it with the hazards of the gaming table, under the contemptuous appellation of Aleatory contracts. But its modern use, which frees trade from the hazard and the spirit of gambling, by the application of the principles of gambling itself, is one of the most beautiful inventions of commerce. Yet what is there so sacred in its character or uses, that while in so many other bargains, the courts of common law are content to enforce only that coarse and worldly-minded honesty, which refrains from palpable fraud; here alone they insist upon punctilious honor. Upon what principle of policy can it be, or of common sense, that the law should have selected the body of underwriters, men commonly among the most vigilant and best informed as to their rights and interests, as the special objects of protection from imposition; whilst in such an infinite variety of other contracts and purchases, which the necessities of life compel men of all classes to enter into, and that often blindly and ignorantly, without knowledge of the worth and quality of what they buy, the law's unvarying answer to complaints of fraudulent concealment or unfair advantage, is "*Caveat Emptor;* you should have been more vigilant; if you have been too confiding, or careless, you must abide the loss. It is only to your ignorance and over-confidence in your neighbour's good faith, that the success of that fraud of which you complain, is to be imputed. But it is an old and uncontradicted legal maxim, that *vigilantibus, non dormientibus, subserviunt leges.* Therefore, that your ignorance may be punished, tha tyour careless, unsuspicious temper may be corrected, and that you may serve as a warning to all others against those faults, the wisdom of our ancestors has decreed that your adversary, who watched while you were asleep, should enjoy unmolested the fruits of his adroitness."

'The incongruity of these collateral branches of the law may be made more obvious by the statement of a case or two. They are imaginary indeed, but very probable. In fact they are only so far imaginary as that they bring together in one view, the facts which occur separately every day. We will suppose that a merchant of New York or Baltimore, extensively engaged in foreign trade, after one of those intervals of contrary winds and long passages which sometimes prevail, and by one of those accidents which have several times happened within our memory, receives the first and only intelligence from Liverpool. His correspondent informs him of a sudden rise of cotton and flour, and the expected short supply of both. A postscript to the same letter adds an account of the loss of a large ship on the coast of Ireland, which from various circumstances of description and date, our merchant has reason to believe, though not with perfect certainty, to be his own Charles John. He loses no time to make the best use of his superior intelligence; he sends off his pilot boats to the south to buy up the planter's cotton; and his agents to contract for flour and grain, at the present rates, not only with the regular flour dealer of the city, who may be on his guard, but with the millers and farmers of the interior. At the same time he effects an insurance on his good ship the Charles John, *lost or not lost*, without giving a hint of the contents of his letter. Now in this latter case, he bargains with the intelligent and skilful officers of an insurance company, men living in the very centre of mercantile and marine news, and with the best information within their reach. In the former case he deals with those, to whom the knowledge upon which he acts, must be wholly inaccessible, and perhaps the very possibility of such intelligence beyond the suspicion of the most vigilant among them. Yet such is our law, that the underwriter, if these facts can be established, may confidently stand upon his defence and refuse to settle the loss; while the planter or the farmer has no remedy.'

After dwelling for some time upon the remarkable incongruity between the law of insurance and that of sale, the author again reverts to the principles upon which equity enforces, or refuses to enforce, the specific execution of agreements, with the view of ascertaining how far these rules accord and harmonize with other parts of the same system. For this purpose, he states it to be well settled, that the concealment of material facts may amount to a degree of *mala fides*, which will exclude the guilty party from all claim to the aid of a court of equity. So in another class of cases, equity has interposed to set

aside conveyances made under a total ignorance of the party's rights, as in the case of an imperfectly executed will, or of a mistake as to the value of a distributive share. How far it will relieve against a mere mistake of law, where all the facts are well understood by the parties, is a point still involved in great doubt. Another head of equity bears a remoter analogy to the subject under consideration, and comprehends all those cases where the court looks with a jealous eye upon contracts entered into between parties, standing in certain intimate and confidential relations to each other, such as attorney and client, guardian and ward, trustee and *cestui que trust*, agent and principal, &c. It is a general rule, that mere inadequacy of price will not afford a ground for rescinding an executed agreement; yet a distinction is made in such cases where the inequality is so strong, gross, and manifest, as to furnish evidence of fraud. But, as the author justly observes, there is great looseness and want of precision in the manner of laying down this exception to the general rule, and great difficulty in its practical application. He applauds the tone of strict and pure morality, and the manly spirit of honor and frankness, which mark the decisions of equity under this head, but is at a loss how to reconcile them with the decisions of the same forum in other cases, which would seem to demand the application of the same measure of justice.

In his third chapter, the author considers the doctrines of the civil law, and of the modern systems founded on it, especially the French code, respecting warranty, concealment, inadequacy of price; and the speculative opinions of civilians, or writers on natural law, relating to the same subject.

'In the civil law,' says he, 'and in its derivative systems, it is laid down as a universal and fundamental position, that the contract of sale depends wholly upon natural law; not only owing its origin to that law, but being entirely governed by the rules deduced from it.* Upon this solid foundation, has been raised a consistent and beautiful system of law in relation to the losses sustained from ignorance of circumstances or facts *intrinsic* to the subject of sale; such, for instance, as secret defects lessening the worth of the thing sold as an object of commerce, or rendering it useless, for the purpose for which it was bought.

* 'Ce contrat est entièrement du droit naturel; car non seulement il doit à ce droit son origine, mais il se gouverne par les seules règles tirées de ce droit. *Pothier, Contrat de Vente.*'

'It is remarkable, that, on comparison, this will be found to be, in every part, nearly the reverse of the law of England, on the same head.'

The civilians hold the vendor to warrant, by implication, against all the defects of the thing sold, which are of a nature to render it unfit for its ordinary use, or so lessen that usefulness, that the buyer would not have purchased, or would not have purchased at so high a price, if he had known them. The general principle of implied warranty has been universally adopted in all the countries of Europe, which have founded their municipal codes upon the Roman law. But it has been modified in practice, as to a reduction of price, corresponding to the disappointment in the expected value of the commodity. This is quaintly, but not inaptly expressed in the Scotch law. 'The insufficiency of the goods sold, if it be such as would have hindered the purchaser from buying, had he known it, *and if he quarrels it recently*, founds him in an action (*actio redhibitoria*) for annulling the contract. If the defect was not essential, he was, by the Roman law, entitled to a proportional abatement of the price, by the action *quanti minoris*. But as our practice does not allow sales to be reduced, on account of the disproportion of the price to the value of the subject, it is probable, that it would also reject the action *quanti minoris*.'

So far the Roman law is founded in good sense, and is capable of application to the affairs of a highly civilized and commercial society. But when, in imitation of those lofty and stern principles, which it borrowed from the Portico, from those masters of philosophy, who, in the language of Tacitus, *sola bona quæ honesta, mala tantum quæ turpia; potentiam, nobilitatem, cæteraque extra animum neque bonis neque malis adnumerant*, they required both from buyer and seller, the full and frank communication of every *extrinsic* circumstance, which might influence the conduct of either; then their doctrine became too sublimated to be indiscriminately adopted in modern practice. But though, in general, this abstract refinement of morals, which defeats its own purpose, by attempting more than the nature of man and of human affairs will enable it to accomplish, has been rejected by the legal institutions of modern Europe, yet a curious fragment of this system is still retained in the law of most of those countries, which have derived their jurisprudence from the 'awful sway' of Rome. We allude to the singular anomaly, which gives the vendor a remedy in case of gross inadequacy

of price, or as the civilians express it, *enormous lesion.* This rule is confined, in its application, to the sale of real property; it being obviously quite impossible to adapt it to commercial transactions and the ordinary transfer of chattels. It also denies to the buyer that equity, which it professes to extend to the seller, by refusing to the former any relief on account of his having paid an excessive price. It made a part of the ante-revolutionary jurisprudence of France, and has been incorporated into the new civil code of that country, notwithstanding the opposition of some of her most distinguished jurists, as Mr Verplanck thinks, on account of temporary, political motives, connected with the policy of giving stability to landed titles and family distinctions, which had been so much shaken by the revolution. It is recognised, we believe, in the civil code of Louisiana; and something like a reference to it may be obviously traced in that part of the Equity system in England, which considers gross inadequacy of price as evidence of fraud.

It is not the least evidence of the wide spread influence of the Roman law in modern times, that all the writers upon the law of nature and nations should have adopted this principle of absolute equality in contracts, as binding in *foro conscientiæ.* But the author of the work before us justly contests its application to this extent, even as a rule of moral obligation; and, in a train of admirable reasoning, shows, in the most convincing manner, that if practically followed, it would deprive every man of the honest fruits of his superior knowledge and skill, of his diligence and labor, and of all those advantages, which a beneficent Providence has enabled him to acquire, and authorized him to enjoy; and, in this manner, would present an insurmountable barrier to the improvement of the world, by taking away the ordinary motives of individual exertion. This he accomplishes by proving, that in ordinary commercial bargains, the exchanging of precisely equivalent values is not even aimed at, or desired, by the parties; and by analyzing the various circumstances, which go to fix the price of commodities, such as constant competition, monopoly founded on public policy, or the just use of private property, soil and seasons, peace and war, and all the various and fluctuating phases of human affairs, as they are influenced by physical, moral, and political circumstances.

After thus seeking in vain, in the two most memorable systems of municipal jurisprudence, which have governed the world, as well as in the celebrated writers on natural and public law, for a

satisfactory rule of contracts, so far as respects inequality of price, or inequality of knowledge, Mr Verplanck, in his fourth chapter, endeavors to deduce such a rule, not merely from the abstractions of metaphysical morality, but from the sound principles of that true science, political economy, which, he contends, influence the motives, and determine the conduct of every buyer and seller, although the parties may not always be conscious of the precise nature of their operation on their own minds.

He begins by inquiring '*What is* PRICE? What are the elements, which form it? What, abstracted from all reference to right and wrong, are the common considerations which enter into the minds of the buyer and seller in making a bargain?' And concludes, that as to things which are *unique*, or very peculiar in their kind, of which there is no regular supply from the soil, or from human labor, and of course no regular market value, price depends wholly on the opinions and the means of the buyer and seller, and consequently there can be no such thing as inadequacy of price. The same rule, also, applies to the buying and selling *of speculation*, to purchases of lands peculiarly situated, or goods bought, not with reference to present use or profit, but with relation to a future and anticipated state of the market. But in the more common case of the buying and selling of articles of domestic use or consumption, or in the wholesale operations of trade in the great staple productions of agriculture or manufactures, the new element of *market price* enters into the calculations, both of buyer and seller, which are no longer controlled by their separate wishes, opinions, and judgments alone, but also by a set of facts common to both, and upon which they mutually reason.

In this class of cases, inadequacy of price may be a ground for setting aside a contract of sale, not from the inadequacy of the price, as compared with the intrinsic value of the article, but as compared with the ordinary market price of the time and place of making the contract. A gross deviation from this standard may imply fraud, or error, in the substance of the contract. But what is it that constitutes fraud, or error, so as to affect a contract in natural equity and morality? The answer to this question is, that no man can ever honestly profit by his superior knowledge, wherever there is a confidence expressly or impliedly reposed in him, that he will take no advantage of it, and wherever this confidence is the efficient cause of his being able to take such advantage. Whatever constitutes the facts and

reasonings of a bargain *peculiar to each individual*, such as skill, and judgment, and personal necessities, can never be expected to be communicated; but with regard to the facts which are, or should be, common to both parties, and which immediately and materially affect price, in the estimate of those who buy and sell, the contract is entered into upon the supposition, that no advantage will be taken by one party, of his superiority of knowledge over the other.

In his fifth chapter, the author continues the same subject, and recapitulates the rules and principles established in the preceding chapter, applying them to all contracts of mutual benefit, contracts of hazard, cases of mutual error, and implied warranty of sort and quality; and considers the different effects of error and of intentional concealment. The next contains a long digression on the question, 'When, and how far, may positive law, in administering justice between man and man, differ from the strict honesty and good faith required by conscience?' He concludes, that it can never be either right or expedient for civil tribunals to establish rules of justice, varying from those pronounced by the tribunal of conscience, unless when compelled by absolute necessity, or manifest public utility; and in the seventh chapter, he endeavors to show, that the strict rules of honesty, regarding inequality of knowledge, or of price, &c. ought to be the governing principles of the whole law of contracts. This he infers from their partial adoption in the law of insurance, in the doctrines of courts of equity, and in the Roman civil law. And he insists, that the only exception to the generality of this position is to be found in the acknowledged fact, that human tribunals must be guided in their application of these doctrines of legal ethics, as well as restricted in the practical remedies they furnish, by those regulations which public policy has established, as to prescription or limitation, the civil character and condition of parties, uniformity of decision, commercial usage, and positive rules of evidence.

Wherever these principles of morality have been adopted, in the practical administration of justice, they have commanded the unqualified approbation of men of common sense, and those versed in the business of human life, as well as of those master minds, who have looked at law as a science, founded upon principle and governed by reason. Such is the case with the whole body of the law of insurance, with all those heads of equity jurisdiction, arising from the peculiar relation of confidence and

trust between certain parties, which we have before adverted to. So, too, the common law courts have remarkably deviated from the general analogy of their own rules, and obeyed the dictates of the purest morality, in that class of cases, which relates to the payment of forged bank notes, or negotiable paper, where both the parties are equally ignorant of the forgery.

'If, then,' says Mr Verplanck, 'these principles are just in themselves; if they are congruous to the common notions of men; if they are capable of being practically applied; if, in the affairs of the greatest magnitude and interest, they have been found not only expedient to be used as legal rules, but even absolutely necessary, why should they not be universal? why should that part of our law, which enters into and affects every man's daily concerns, be disgraced by contradictions, which, if they were nothing more than deviations from the rest of the system, would be useless and perplexing? How much worse, if these deviations afford shelter for dishonesty, if they are repugnant to the usages of trade, and the common reasonings of civilized men?' p. 195.

The eighth chapter contains a view of the practical result of those doctrines of law and equity, which arbitrarily vary from the rules of natural justice, their confusion and contradiction, and the bad effects they have produced on the public morals. Allusion is made to the liberal spirit of legal improvement, which is now abroad in the world, and a strong desire is expressed, that it should embrace the law of sales. In the opinion of the author, no more practical or beneficial innovation could be made in our civil jurisprudence, than to introduce the rules of the Roman law, as to implied warranty of quality and kind. This he would have done, not piecemeal, or in insulated decisions, which only create confusion, but thoroughly and upon principle.

The principles of the ancient civil law, and the modern European codes founded upon it, might be embodied in the language of our own system of jurisprudence, by merely expanding into general provisions, what has already been decided in numerous particular cases. With this view, the author recapitulates, in his eighth and last chapter, the principles and rules, which his arguments tend to establish. These, we presume, he did not mean to offer, as the project for the text of a written code on the subject, for it would then be deficient in that precision, which is so difficult, and at the same time so necessary to be attained in every system of written law; but only as a

summary of his own principles and views. Considered in this light, we regard this collection of axioms and corollaries as of great value, exhibiting the ingenious theory of the author in a condensed form, and illustrating his reasonings in support of it. We regret that we have not room to insert this summary, which would probably convey to our readers a clearer notion of the author's views, than will be gathered from the imperfect analysis we have attempted of a work, which we regard as one of the most original and interesting publications upon the theory of jurisprudence, that has recently appeared.

We heartily concur in the wish, expressed by Mr Verplanck, that it may excite public attention to the improvement of this title of the law of contracts, and we will add our desire, that he may be induced, by the success of the present attempt, to turn his attention to other projects of reform in legislation. An attentive examination of several titles of positive law, such as the statute of frauds and limitations, for example, would tend to expose the defects, uncertainty, and contradictions of the system of judicial interpretation, amounting in effect to legislation, which has perverted the original policy of these wise laws, and calls for a revision of their text, with the view of clearing up the obscurities, which originally adhered to it, or have been interpolated by the excessive latitude of construction, which has been indulged with respect to them. At the same time, we would not be understood as meaning to deny, that many excellent rules are contained in the body of judicial decisions upon these statutes, which would furnish valuable materials for a new builder to construct an edifice more harmonious in its parts, and better adapted to promote the purposes, for which it was designed.